Supreme Court, U.S.
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No. 96-2027

In The

Supreme Court of the United States

October Term, 1996

CHARLY INTERNATIONAL, APS
CHARLY HOLDINGS, INC.,

Petitioners,

vs.

MCA RECORDS, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

Respondent MCA Records, Inc. is a subsidiary of Universal Studios, Inc. (formerly MCA, Inc.), which is 80% owned by Seagram Co. Ltd. ("Seagram") and 20% owned by Matsushita Electric Industrial Co. Ltd. ("Matsushita"). Both Seagram and Matsushita have issued shares to the public. MCA Records, Inc. does not have any subsidiaries.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. REASONS WHY THE PETITION SHOULD BE DENIED 7

A. The Ninth Circuit Properly Followed The Decisions Of This Court In Affirming Jurisdiction Over Petitioners 7

B. Petitioners' Construction of "Purposeful Availment" Would Mean That A Foreign Licensor Which Intentionally Infringed A United States Trademark Could Evade Jurisdiction 13

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Industry Co., Ltd. v. Superior Court,
480 U.S. 102 (1987) 7

Bensusan Restaurant Corp. v. King,
937 F.Supp. 295 (S.D.N.Y. 1996) 14

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 8

Business Trends Analysts v. Freedonia Group, Inc.,
650 F.Supp. 1452 (S.D.N.Y. 1987) 12

Cadence Design Systems, Inc. v. Verilog, S.A.,
779 F.Supp. 473 (N.D. Cal. 1991) 12

Calder v. Jones,
465 U.S. 783 (1984) 1, 8, 10

CompuServe, Inc. v. Patterson,
89 F.3d 1257 (6th Cir. 1996) 14

Core-Vent Corp. v. Nobel Industries AB,
11 F.3d 1482 (9th Cir. 1993) 11

G.H. Bass & Co. v. Wakefern Food Corp.,
21 U.S.P.Q. 2d 1862 (S.D.N.Y. 1991) 11

Honeywell, Inc. v. Metz Apparatewerke,
509 F.2d 1137 (7th Cir. 1975) 12

Inset Systems, Inc. v. Instruction Set, Inc.,
937 F.Supp. 161 (D.Conn. 1996) 14

International Shoe Co. v. Washington,
316 U.S. 310 (1945) 1

Lipton v. The Nature Co.,
781 F.Supp. 1032 (S.D.N.Y. 1992) 12

MCA Records, Inc. v. Charly Records, Ltd. et al.,
865 F.Supp. 649 (C.D. Cal. 1994) 5

Maritz v. Cybergold, Inc.,
947 F.Supp. 1328 (E.D.Mo. 1996) 14

McDonough v. Fallon McElligott, Inc.,
1996 W.L. 753991 (S.D.Cal. 1996) 14

Minnesota v. Granite Gate Resorts,
1996 W.L. 767431 (D. Minn. 1996) 14

Pony International, Inc. v. Genfoot America, Inc.,
223 U.S.P.Q. 1150 (S.D.N.Y. 1983) 12

Reebok International, Ltd. v. McLaughlin,
49 F.3d 1387 (9th Cir.), cert. denied,
___ U.S. ___, 116 S.Ct. 276 (1995) 8

Schieffelin & Co. v. Jack Co. of Boca, Inc.,
725 F.Supp. 1314 (S.D.N.Y. 1989) 11

Sinatra v. National Enquirer, Inc.,
854 F.2d 1191 (9th Cir. 1988) 8

I. STATEMENT OF THE CASE

As detailed below, the Ninth Circuit Court of Appeals properly followed and applied the due process standards prescribed by this Court in such cases as International Shoe Co. v. Washington, 326 U.S. 310 (1945) and Calder v. Jones, 465 U.S. 783 (1984) in concluding that, based upon the extensive record before it, the District Court properly found personal jurisdiction over Petitioners Charly Holdings, Inc. ("Charly Holdings") and Charly Records International A.P.S. ("Charly International") (Charly Holdings and Charly International sometimes are referred to collectively as "Petitioners.") Contrary to Petitioners' suggestion, the Ninth Circuit's opinion is consistent with established principles of personal jurisdiction over foreign defendants and, therefore, does not call for an exercise of this Court's supervisory power.

Respondent MCA Records, Inc. ("MCA"), a California corporation, brought this action to protect its rights to the master recordings contained in one of the most historic rhythm and blues music collections in the world -- the Chess Catalogue -- and to the "Chess" registered trademarks. The defendants in this action were Petitioner Charly Holdings and its agents and wholly owned subsidiaries, Petitioner Charly International and Charly Records[1] (all three Charly entities sometimes

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[1] Charly Records is not a party to the Petition. After Charly Records failed to answer and its default was entered (CR 74, ER 749), the District Court entered judgment against Charly Records for $5,114,416.14, representing Charly Records' proceeds from infringing United States sales and $2,057,597.68 as punitive damages. (CR 425, ER 1051.) The Ninth Circuit affirmed the District Court's ruling.

are referred to collectively as "Defendants"). The Defendants unlawfully duplicated and sold Chess Masters[2] in the form of compact discs and cassette tapes, and licensed and used the Chess registered trademarks worldwide, including in California.

Through a series of incestuous agreements, all three Charly Defendants embarked upon an unlawful, international exploitation of the Chess Masters and the Chess registered trademarks. In these agreements, the Defendants specifically recognized the "agency" relationship among themselves. **(SER 63, 99 [Trial Ex. 69].)**[3] Initially, Charly Holdings (a Panamanian corporation **(CR 107, ER 762)**) entered into an agreement with its wholly-owned subsidiary, Charly International (a Danish corporation **(CR 111, ER 779)**), whereby Charly Holdings purported to license to Charly International the right to "press, duplicate and sell in the Territory Phonograph Records . . . manufactured from the master recordings in the Chess/Checker/Cadet/Argo catalogues . . ." as well as the "right to use the Chess name/logo and/or Seahorse logo . . ." **(SER 88 [Trial Ex. 69].)** The defined "Territory" for these rights was "the world." **(SER 90 [Trial Ex. 69].)** Charly International warranted that it "is now and will continue to be engaged during the Term of this Agreement in the manufacture,

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[2] As used throughout this action, the term "Chess Masters" referred to the master recordings listed in the two-volume published work entitled "The Chess Labels -- A Discography." **(Trial Ex. 73; CR 310, ER 796; RT 58-60, CR 367, ER 836-838.)**

[3] "CR" denotes the District Court Clerk's Record number; "ER" the Excerpts of Record page number; "SER" the Supplemental Excerpts of Record page number; "RT" the Reporters' Transcripts; and "Trial Ex." the Trial Exhibits.

sale, distribution and exploitation of Phonograph Records in the Territory." **(SER 94 [Trial Ex. 69].)** Pursuant to the agreement, Charly Holdings supplied the Chess Masters (obtained in the U.S.) to Charly International. **(SER 90 [Trial Ex. 69].)** The agreement also provided that all labels of records released pursuant to the agreement would contain Charly Holdings' trademark "CHARLY." **(SER 91-92 [Trial Ex. 69].)** The agreement required Charly International to account for and pay Charly Holdings "an amount equal to 90% of any and all fees royalties and advances received by or credited to [Charly International] or on its behalf in respect of the exploitation of the Licensed Masters or any of them." **(SER 91 [Trial Ex. 69].)** Charly Holdings agreed to indemnify and hold Charly International harmless from claims concerning the Chess Masters. **(SER 95 [Trial Ex. 69].)**

Then, Charly International entered into an agreement with Charly Holdings' other wholly-owned subsidiary, defendant Charly Records, whereby Charly International purported to re-license to Charly Records rights in the Chess Masters and the Chess trademark. **(SER 65-66 [Trial Ex. 68].)** In that agreement, Charly Records acknowledged that Charly International "own[s] and/or control[s] exclusively all rights and goodwill in respect of the name and trading style Charly Records . . ." **(SER 63 [Trial Ex. 68].)** Charly Records agreed to account and pay royalties on each record sold pursuant to the agreement, including on "export" records. **(SER 68-71 [Trial Ex. 68.])** Charly International supplied the Chess Masters to Charly Records and Charly Records agreed that all records would bear the trademark "CHARLY." **(SER 71 [Trial Ex. 68].)** Charly International agreed to indemnify and hold Charly

Records harmless from claims concerning the Chess Masters. **(SER 63, 75 [Trial Ex. 68].)**

As a result of the foregoing series of transactions, infringing Chess recordings bearing the CHARLY tradename were offered for sale and sold throughout the United States, including California. Petitioners' suggestion that the evidence showed only about $170 of direct sales of Chess product in the United States **(Petition at 5 n.4)** is disingenuous and refuted by the record. MCA presented evidence of direct sales of hundreds of thousands of dollars of recordings in California alone, including over 700 albums containing Chess recordings. **(CR 34, ER 405-445, SER 15.)**

As the Ninth Circuit noted, also crucial to the jurisdictional issue was Charly International's license of a well-known Chess Master, "White Cliffs of Dover," for world-wide use (including the United States) in the popular motion picture "The Crying Game" and in the soundtrack album for the film. The soundtrack album (bearing Charly International's name) was available for purchase, and was purchased, in California, and the motion picture (for which Charly International received an on-screen credit) was widely distributed in California and the rest of the United States. **(RT 122-125, CR 367, ER 898-901; SER 102 [Trial Ex. 172].)**

Prior to trial, the Court granted MCA's motion for summary judgment with respect to its declaratory relief claim, holding that Charly Holdings and Charly International do not now have, and never did have, any rights in the Chess Masters, and that MCA has exclusive rights in those recordings. **(CR 310, ER 801; CR 311, ER 824.)** The District Court opinion is reported at MCA

Records, Inc. v. Charly Records, Ltd. et al., 865 F.Supp. 649 (C.D. Cal. 1994).[4]

MCA's remaining claims were tried before a jury. During the trial, the District Court ruled that MCA's damages would be limited to Defendants' sales in the United States. **(RT 255, CR 367, SER 47.)** At the conclusion of MCA's case, the District Court denied Petitioners' motion for judgment as a matter of law on the issue of jurisdiction, and concluded:

> "I could have easily found personal jurisdiction prior to this date, but no motion had ever been tendered to this court. But given the facts that have been received in this case, it's a very clear ruling that there is personal jurisdiction with regard to the two defendants before this court." **(RT 254, CR 367, SER 46.)**

Thereafter, Petitioners presented their defense on the merits. **(RT 254, CR 367, SER 46.)** The jury returned a verdict in MCA's favor, and awarded compensatory damages against Charly Holdings in the amount of $3.6 million and against Charly International in the amount of $400,000. **(RT 342, CR 367, SER 50.)**

After trial, based on a number of theories (but not lack of personal jurisdiction), Charly Holdings and Charly

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[4] MCA has requested publication of the Ninth Circuit's opinion because of the previously published opinion of the District Court, not, as implied by Petitioners, because of the importance or uniqueness of the issues addressed by the Ninth Circuit. See Ninth Circuit Rule 36-2(e).

International moved for judgment as a matter of law, for a new trial, or to alter or amend the judgment. **(CR 365.)** The District Court granted a new trial solely on the issue of damages, and denied the remaining motions.[5] **(CR 374.)** When Charly Holdings and Charly International refused to appear at the retrial, the District Court entered their defaults on the issue of damages.[6] **(CR 413.)** Thereafter, based upon evidence submitted by MCA regarding the extent of Defendants' exploitation of the Chess Masters and Chess trademarks in the United States, the District Court entered judgment against Defendants totalling $7,892,617.50. **(CR 425, ER 1051.)**

Defendants' subsequent appeal challenged only the District Court's exercise of jurisdiction. The Ninth Circuit affirmed, holding that:

> "By licensing products they knew would eventually be distributed in the United States and would infringe a California resident's rights, [Charly] Holdings and [Charly] International should reasonably

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[5] Petitioners' reference to the District Court's purported comments at a subsequent unreported settlement conference **(Petition at 5)** is both irrelevant and outside the record. Indeed, Petitioners' counsel of record here was not even present at the settlement conference, nor could he be since he was not ever counsel of record before the District Court.

[6] Of course, the fact that, at the initial trial, Petitioners presented a defense on the merits after the District Court found personal jurisdiction is inconsistent with their subsequent position that appearing at the damages retrial would have constituted a "voluntary submission" to the District Court's jurisdiction under English law. **(See Petition at 5-6.)**

expect to be hailed into a California court to defend an infringement action." **(Petition App. 24.)**

II. REASONS WHY THE PETITION SHOULD BE DENIED

A. The Ninth Circuit Properly Followed The Decisions Of This Court In Affirming Jurisdiction Over Petitioners.

In International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), this Court announced that the exercise of personal jurisdiction is proper and Constitutional when a nonresident has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[7] The rule announced in International Shoe has been explained and applied by this Court in cases involving intentional torts. See, e.g., Calder v. Jones, 465 U.S. 783 (1984). Jurisdiction over a nonresident defendant exists where (1) the nonresident defendant does some act or consummates some transaction with the

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[7] Petitioners' reference to the split of authority in Asahi M al Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 112 (1987) is relevant. In Asahi, a divided Supreme Court disagreed on whether the mere placing a product in the "stream of commerce" without more would constitute purposeful availment. Here, given the extensive record concerning Defendants' other intentional conduct directed to California and at a California resident, as the District Court noted: "it is unnecessary to choose between these competing visions as Defendants' contacts are sufficient to satisfy even the more st ngent standard" set forth in Asahi. **(CR 62, ER 744.)**

forum or performs some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction is reasonable. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985); Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988). Here, the Ninth Circuit's finding of jurisdiction is consistent with this Court's decisions concerning jurisdiction over foreign defendants.

As the Ninth Circuit correctly noted, the District Court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. See, e.g., Reebok International, Ltd. v. McLaughlin, 49 F.3d 1387, 1390 (9th Cir.) cert. denied, ___ U.S. ___, 116 S.Ct 276 (1995). Both the District Court and Ninth Circuit found that the Chess recordings licensed by Charly Holdings and Charly International did not end up in California fortuitously. Charly Holdings and Charly International purported to license rights to the Chess Masters and Chess trademarks, provided under these licenses the precise means by which MCA's rights were infringed in California, and received substantial benefit from those infringements. The evidence in the record included:

(1) Chess recordings (with the registered Chess trademark) bearing the names of Charly Holdings and Charly International were sold in California **(CR 34, ER 222, 239; RT 141-142, CR 367, ER 917-918)**;

(2) Charly Holdings and Charly International received royalties directly calculated on those sales **(SER 68-70, 91, 102 [Trial Exs. 68, 69, 172)**;

(3) Pursuant to an agreement with Red Dog (a U.S. company against which MCA has obtained a California judgment), Charly Holdings purported to obtain worldwide rights to the Chess Masters, and under that agreement obtained delivery from the U.S. of the Chess Masters (**SER 52, 57 [Trial Ex. 67]**);

(4) Charly Holdings purported to license worldwide rights to the Chess Masters and Chess trademarks to its wholly-owned subsidiary, Charly International, and specifically required that the Chess Masters be exploited throughout the world (**SER 87-88, 90 [Trial Ex. 69]**);

(5) Charly International licensed and conveyed Chess Masters to Charly Records which sold recordings directly in California (**SER 65-67 [Trial Ex. 68]**);

(6) Charly International licensed rights in a Chess Master for worldwide use (including California) in the popular motion picture "The Crying Game," which was distributed and exhibited in California and for which it received a screen credit (**RT 122-125, CR 367, ER 898-901; SER 102-103 [Trial Ex. 172]**);

(7) Charly International also licensed rights in a Chess Master for the soundtrack album for "The Crying Game" and received credit on the soundtrack album, which was sold in California (**RT 122-125, CR 367, ER 898-901; SER 102-108 [Trial Ex. 172]**);

(8) Charly International and Charly Holdings required that the unlawful recordings made from MCA's Chess Masters bear their trademark "CHARLY" (**SER 91-92 [Trial Ex. 69]**); and

(9) Charly Holdings claimed U.S. copyright protection for the infringing Chess recordings (**RT 74, 135, 139, CR 367, ER 852, 911, 915.**).

Notably, not only did Petitioners fail to adduce evidence at trial to dispute MCA's evidence, but Petitioners did not call a single witness to explain how their infringing products reached California retail stores and California consumers other than through them.

Aside from their extensive exploitation of the Chess recordings in California, as found by the jury and discussed by the Ninth Circuit, Petitioners intentionally committed the commercial tort of trademark infringement directed against MCA, a California resident. **(Petition App. 20-21.)** Petitioners have not appealed this portion of the judgment. Having intentionally infringed MCA's trademarks in California, committed unfair competition in California, and tortiously interfered with MCA's rights in California, Petitioners have subjected themselves to jurisdiction in California.

A party who commits an intentional tort, knowing it will have an effect in a state, is subject to jurisdiction in that state. Calder v. Jones, 465 U.S. 783, 789-90 (1984). In Calder, this Court found California jurisdiction proper where National Enquirer employees composed an allegedly libelous story in Florida about a California resident. This Court concluded that jurisdiction was proper since the employees knew the article "would have a potentially devastating impact upon [the plaintiff, and] they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives . . . ". The Calder rule applies to the intentional tort of trademark infringement. See, e.g., G.H. Bass & Co. v. Wakefern

Food Corp., 21 U.S.P.Q.2d 1862, 1865 (S.D.N.Y. 1991); Schieffelin & Co. v. Jack Co. of Boca, Inc., 725 F.Supp. 1314, 1318 (S.D.N.Y. 1989).[8] Thus, in the instant case, Petitioners' infringement occurred (repeatedly) in California. **(e.g., CR 32, 34, ER 24, 222, 232-233, 265, 273, 307-308, 336; RT 70-74, 87-88, 116-122, CR 367, ER 848-852, 863-864, 892-898.)**

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[8] Petitioners' reliance on the dissenting Judge's citation to Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482 (9th Cir. 1993) is misplaced. First, the finding of jurisdiction here was not based solely on the location of MCA; rather, Defendants' committed intentional torts in California, knowing that MCA was located and would be injured there. Second, the Core-Vent Court did note that "a corporation does not suffer in a particular geographic location in the same sense that an individual does." Id. at 1486; however, in concluding that the purposeful availment prong was satisfied, the Court in Core-Vent specifically rejected defendants' argument that acts intended to harm a corporation were not directed to the geographical location where the corporation is located:.

> "Such a categorical approach is antithetical to Calder's admonishment that the personal jurisdiction inquiry cannot be answered through application of a mechanical test but instead must focus on the relationship among the defendant, the forum, and the litigation within the particular factual context of each case."

Id. at 1487. Here, based upon the extensive record before them, the District Court and Ninth Circuit properly concluded that the brunt of the harm of Petitioners' misconduct was felt by MCA in California where it is incorporated and has its principal place of business, and where infringing Chess product was offered for sale and sold.

Charly Holdings' and Charly International's license of the right and providing of the means to others (more specifically, wholly-owned related companies) to sell Chess recordings in California is sufficient to confer jurisdiction over them since they clearly and intentionally promoted the transaction of business in California for their own financial gain. See, e.g., Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975); Lipton v. The Nature Co., 781 F.Supp. 1032, 1036 (S.D.N.Y. 1992) (licensor subject to New York jurisdiction where licensee sells infringing product in New York, pays licensor royalties based on sales, and uses licensor's name in advertising literature); Pony International, Inc. v. Genfoot America, Inc., 223 U.S.P.Q. 1150, 1152 (S.D.N.Y. 1983) (licensor of "worldwide" trademark rights subject to jurisdiction in New York where licensee marketed the trademarked goods in New York); Business Trends Analysts v. Freedonia Group, Inc., 650 F.Supp. 1452, 1456 (S.D.N.Y. 1987) ("An actual sale is not necessary to establish personal jurisdiction and the tortious acts may be performed directly by the defendant or through an agent, who may be an independent retail merchant."). See, also, Cadence Design Systems, Inc. v. Verilog, S.A., 779 F.Supp. 473, 475 (N.D. Cal. 1991) (French corporation with no California employees, offices, property, bank account, mailing address, or telephone listing subject to California jurisdiction where it provided assistance and support staff to related company selling its products in California).

Moreover, Petitioners specifically were made aware that their intentional infringement harmed MCA in California. As the Ninth Circuit observed, "Bruce Resnikoff [an MCA executive] testified that MCA's acquisition of the Chess Masters in 1985 was publicized

in virtually every music periodical in the world, as well as in non-music press . . . [and] that someone from MCA contacted Charly Holdings on more than one occasion and informed him that they were infringing MCA's rights in the Chess Masters." **(Petition App. 20-21).** Thus, Petitioners knew that their conduct not only would result, but actually resulted, in infringing products being distributed in the United States and California, and in the resulting harm to MCA.

Notably, Petitioners did not even argue to the Ninth Circuit that the exercise of jurisdiction over them would be burdensome **(Petition App. 22).** Nor could they, given Petitioners' deliberate infringing activities in California. Under these circumstances, the Ninth Circuit correctly concluded that the exercise of jurisdiction over Petitioners was reasonable.

B. Petitioners' Construction of "Purposeful Availment" Would Mean That A Foreign Licensor Which Intentionally Infringed A United States Trademark Could Evade Jurisdiction.

Petitioners wrongly argue that the Ninth Circuit's reasoning would allow unlimited jurisdiction over worldwide licensors of artistic materials **(Petition at 12).**[9]

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[9] The cases cited by Petitioner involving the Internet present significantly different issues and, moreover, actually support the finding of jurisdiction over Petitioners **(Petition at 12-13 n.7).** Maritz v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo. 1996) and Minnesota v. Granite Gate Resorts, 1996 W.L. 767431 (D. Minn. 1996) both found jurisdiction where a website could be accessed in the forum state. See, also, CompuServe, Inc. v. Patterson, 89 F.3d

(continued...)

To the contrary, under Petitioners' construction, it is the opposite which would be true -- a holder of U.S. trademark rights would never be able to vindicate its rights against a foreign defendant which issued a worldwide license and supplied infringing product for worldwide distribution. Moreover, to make their dubious point in the first place, Petitioners greatly exaggerate the scope of the Ninth Circuit's opinion. Following Calder, the Ninth Circuit specifically limited its analysis to cases involving intentional torts. The Ninth Circuit correctly concluded that where, as here, a foreign defendant commits an intentional tort against a United States resident, that defendant may be sued where the resident suffers the injury. Any other rule would insulate a foreign tortfeasor from intentional conduct which causes harm to U.S. residents in the United States. And, here, the District Court found that Petitioners intentionally violated MCA's U.S. trademark rights from which they reaped substantial revenues. As the Ninth Circuit concluded:

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[9](...continued)
1257 (6th Cir. 1996); Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D.Conn. 1996)). The cases holding to the contrary, Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y. 1996) and McDonough v. Fallon McElligott, Inc., 1996 W.L. 753991 (S.D.Cal. 1996) clearly are distinguishable. In Bensusan, the Court granted defendants' motion to dismiss for lack of jurisdiction because "there [was] simply no allegation or proof that any infringing goods were shipped into New York or that any other infringing activity was directed at New York or caused by King to occur here." Bensusan Restaurant Corp. v. King, 937 F.Supp. at 295. In McDonough, the Court concluded that, where the defendant does not direct any activities to the forum state, the mere fact alone that the defendant maintains a website which may be accessed from anywhere in the world is insufficient to confer jurisdiction. McDonough v. Fallon McElligott, Inc., 1996 W.L. at 753911.

"MCA can only obtain effective relief for the alleged infringement of its federally-protected trademark rights in the United States. If jurisdiction is found to be lacking, a foreign licensor of worldwide rights to a foreign licensee could never be held accountable in the United States even if it knew that the infringing product is likely to be distributed in the United States and would infringe a United State's resident's rights." **(Petition App. 24.)**

III. CONCLUSION

The Ninth Circuit properly followed and applied the decisions of this Court in finding and affirming jurisdiction over Petitioners. For the reasons set forth herein, the Petition should be denied.

Dated: July 25, 1997

Respectfully submitted,

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